territorial jurisdiction, the court being a creature of statute and therefore being entirely a Malaysian Act, it does not extend to the United States of America or any foreign country. Therefore, being dissatisfied with this ruling, the applicants then applied for the same points of law to be referred to the High Court. The Industrial Court heard the application on October 9, 1986 and on October 16, 1986 handed down its Award No. 298 of 1986. It came to the same conclusion as that in Award No. 187 of 1986. Its conclusions are as follows:

"The law is therefore clear where extra-territorial powers of the Industrial Court is concerned. From the Federal Court case of *Hotel Equatorial (M) Sdn. Bhd.* v. *National Union of Hotel, Bar and Restaurant Workers* [1984] 1 M.L.J. 363, it has been stressed that all four conditions in section 33A of the Act must be satisfied before any point of law can be referred to the High Court. We find that the points of law raised are not of sufficient doubt to merit such reference and we accordingly dismiss the application."

The above conclusion, as forming the basis of the court's decision, is now being attacked by the applicants as being "a jurisdictional error of law in arriving at its conclusion that the question of law was free of sufficient doubt." Counsel for the applicants relied heavily on the House of Lords case of *Anisminic* v. *Foreign Compensation Commission & Anor.*[5] on the question of jurisdictional error. It was submitted that the Industrial Court in deciding its refusal to refer the matter to the High Court had:

(a) posed the wrong factual construct in attempting to answer the question;

(b) asked the wrong question and/or applied the wrong test;

(c) failed to take into account relevant considerations and took into account irrelevant considerations;

(d) answered the questions and failed to consider, in the light of the correct law, whether there was sufficient doubt.

In my judgment, I am satisfied after reading the award that the Industrial Court in handing down its award did consider the correct law and applied its mind to the proper questions for the purpose of making the award. It had properly followed the correct principles and applied the four conditions under section 33A(1) of the Act and came to its conclusion that the points of law raised were not of sufficient doubt to merit any reference to the High Court. I should reiterate that the President of the court had considered the issues thoroughly and correctly. On the fundamental issue of jurisdiction, he gave his reasons why the court has no extra-territorial powers.

For the above reasons, I have no reason to disagree with him. This application for a judicial review by way of certiorari is therefore dismissed. In the exercise of my discretion, I make no order as to costs.

Application dismissed.

Solicitors: *Nijar & Nijar; Mohideen Abdul Kader Meena Rejes & Partners; Mahinder Singh Dulku; Jayaraman, Ong & Co.; Shook Lin & Bok.*

KENIDI BIN SIMA & ANOR. v. THE GOVERNMENT OF THE STATE OF SABAH & ANOR.

[O.C.J. (Chong Siew Fai J.) October 16, 1987]

[Kota Kinabalu – Originating Summons No. 121 of 1987]

Local Government – Census taken by government – Private company assisting – Interlocutory injunction to restrain private company from assisting – Application for – Merits of application.

The first and the second plaintiffs came to Sabah from the Philippines. Sometime after their arrival, they registered themselves with the Resettlement (or Settlement) Division of the Chief Minister's Department. In 1987, an exercise was conducted by the first defendant, the Government of the State of Sabah, and the second defendant, Institute For Development Studies (Sabah), a private company, to establish the identities and actual status of refugees and illegal immigrants. Fearing police action or deportation, the two plaintiffs applied for an interlocutory injunction to restrain the second defendant whether by themselves or by their directors, officers, servants or agents from assisting the first defendant in the exercise.

Held: (1) the issues raised required investigation in depth and mature consideration of the law such as the Federal Constitution and some other enactments;

(2) even if the second defendant was restrained in this application, there was nothing to prevent the first defendant from itself carrying on or enlisting the assistance of other bodies or persons to carry on the exercise. The impracticability and the ineffectiveness of the interlocutory relief as sought in relation to the continuance of the exercise was obvious;

(3) damages would be an adequate remedy and the defendants would be in a financial position to pay them;

(4) assuming that damages would not be an adequate remedy, the balance of convenience lies in favour of refusing the interlocutory relief as sought;

(5) in the exercise of the court's discretion, the application was refused.

Cases referred to:

(1) *American Cyanamid Co.* v. *Ethicon* [1975] A.C. 396.
(2) *Cayne* v. *Global Natural Resources* [1984] 1 All E.R. 225.
(3) *Smith* v. *Inner London Education Authority* [1978] 1 All E.R. 411.

ORIGINATING SUMMONS.

Sugumar Balakrishnan for the plaintiffs.

Stephen K.S. Foo (Attorney-General) (*Juprin Wong Adamal* with him) for the first defendant.

Mary Roberts (Miss) for the second defendant.

Cur. Adv. Vult.

Chong Siew Fai J.: This is an application by the plaintiffs for interlocutory injunction to "restrain the second defendants, the Institute For Development Studies (Sabah), whether by themselves or by their directors, officers, servants or agents or otherwise howsoever from participating in and/or in assisting and/or in undertaking and carrying out jointly or otherwise with the Settlement Division of the Chief Minister's Department of the census-cum-registration drive currently undertaken by the first defendants throughout the State of Sabah to establish the identities and actual status of refugees and illegal immigrants until after the hearing of the originating summons herein, or until further order."

Originally, the application was *ex parte*. However, before the return date on October 2, 1982, counsel for the plaintiffs, on his own initiative, had chosen (quite appropriately, I would say) to serve copies of the application on the defendants. Consequently, there has been arguments in depth by both sides on the application.

Personal facts of the plaintiffs

Some knowledge on the background of the two plaintiffs may be helpful. The two plaintiffs came to Sabah from the province of Tawi Tawi in the Philippines: the first plaintiff, in 1980, and the second plaintiff, in 1977. Sometime after their arrivals, they respectively registered themselves with the Resettlement (or Settlement) Division of the Chief Minister's Department and were subsequently issued with visit passes by the Immigration Department, Sabah, which passes were renewable and had in fact been renewed "on a number of occasions". In the case of the first plaintiff, the pass is valid till March 4, 1988 while that of the second plaintiff, till December 11, 1987.

In April 1987, both plaintiffs registered themselves with the Sabah police authorities under an operation known as "Operasi Bersih" conducted by the Sabah police, and each of them was issued a card bearing a number (exhs. "B" and "E" annexed to the plaintiffs' joint affidavit made on September 17, 1987).

"Census-cum-registration" exercise

It appears not in dispute that some months ago this year (1987), the first defendant, the Government of the State of Sabah, with the assistance of the second defendant, the Institute For Development Studies (Sabah), a private limited company incorporated under the Companies Act 1965, began a "census-cum-registration" exercise ("the exercise") in all major transient settlements in Sabah and the exercise is still going on, that the second plaintiff had registered himself under the exercise which he said he did for fear of threatened police action and/or deportation while the first plaintiff has not so registered but he said he feared he might be forced to by threat of police action and/or deportation.

Objects of the exercise

According to the newspaper article (exh. "C" annexed to the plaintiffs' joint affidavit made on September 17, 1982), the exercise is to establish the identities and actual status of refugees and illegal immigrants and the main aim thereof was "to work out a beneficial solution to the problem of 'alien' presence and not so much of deporting or sending them back".

In the affidavit made on October 1, 1983 by Michael Chin Chen Phin, the director of the Resettlement (or Settlement) Division of the Chief Minister's Department, Kota Kinabalu, Sabah, the said Michael Chin deposed that the said Division set up in 1976 was to deal with temporary resettlement of refugees, displaced persons and illegal immigrants who had come from the Southern Philippines and all other related matters including the administration of funds contributed by the United Nations High Commission for Refugees and that the registration exercise conducted previously

(*i.e.* prior to the present census-cum-registration exercise in question in this action) was on a voluntary basis. That the previous registration of the settlers was voluntary appears to find support from the affidavit evidence of the first plaintiff who said that on his arrival in Sabah from the Philippines, he was advised by his relatives to register himself, which he did, with the Resettlement Division and also, to a lesser degree, from the second plaintiff's affidavit evidence that upon arrival in Sabah he duly registered himself with the said Division.

In his affidavit, Michael Chin further said, which was uncontroverted, that the present exercise was to allow the refugees, displaced persons and illegal immigrants from the Southern Philippines to register themselves with the Division again with a view to issuing them with a more permanent form of registration cards to replace the old papers, many of which had been found to have been forged and issued by unauthorized persons.

Michael Chin's affidavit evidence that the exercise involves matters pertaining to land housing and town and country planning seems to find some consistency with some of the purposes appearing in the newspaper article (exh. "C" annexed to the plaintiffs' joint affidavit), for example, about proposals to build up a comprehensive and detailed data bank for status classification, monitoring population movements and employment and development planning in respect of the transient population.

Serious questions to be tried?

In the course of the hearing of this application, arguments were advanced as to whether the plaintiffs had the right or interest to maintain this action, whether the first defendant had the authority to conduct the exercise and the *locus standi* of the second defendant in participating or assisting in the exercise. On the arguments as canvassed and on the materials as available, I am not prepared to say with any degree of acceptable certainty that there is no serious question to be tried: in other words, that the plaintiffs' claims are frivolous or vexatious. For the purpose of this application, I assume that the contrary is the case. The issues raised require investigation in depth and mature consideration of the law such as the Federal Constitution and some other enactments. They will be dealt with at some later stage or in the main trial of this action.

Elements to consider

Before proceeding further, I would make an observation. In the submissions, counsel went straight from the issue of whether serious questions existed to the question of balance of convenience in which adequacy of damages was dealt as part of the latter topic, *i.e.* balance of inconvenience. My understanding from the reading of *American Cyanamid Co.* v. *Ethicon Ltd.*[1], however, is that after dealing with the issue of serious question to be tried, the next element to consider is the adequacy or inadequacy of damages to either side. The question of balance of convenience arises when there is doubt as to the adequacy of the respective remedies in damages available to either party or to both. In *American Cyanamid's* case, Lord Diplock said (p. 408B):

> "So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

This was followed by a discussion on the question of adequacy of damages after which he continued (p. 408F):

> "It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises."

Adequacy or inadequacy of damages

I shall now proceed to the question of the adequacy of damages or otherwise. The principle is whether if the plaintiffs were to succeed at the trial in establishing their rights to the permanent injunction as sought against the second defendant, the plaintiffs would be adequately compensated by an award of damages for the loss they would have sustained as a result of the second defendant continuing to do what was sought to be enjoined between the time of this application and the time of the trial. The law is that if damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiffs' claim appeared to be at that stage: *American Cyanamid's* case (p. 408).

In the instant application, it is pertinent to note that on the relief as framed and sought, the exercise will not and cannot be effectively restrained. The application is directed against the second

defendant only; the first defendant is not joined, perhaps for good reason. But it is clear from the evidence that the exercise was initiated and brought about by the first defendant. The second defendant merely assists in the conduct of the exercise. Hence, even if the second defendant were restrained in this application, there is nothing to prevent the first defendant from itself carrying on or enlisting the assistance of other bodies or persons to carry on the exercise. The impracticability and ineffectiveness of the interlocutory relief as sought in relation to the continuance of the exercise is obvious.

Now, as to whether damages would be an adequate remedy, the case of the first plaintiff, who has not registered under the exercise, is that he fears being forced to register and that his refusal or failure to register might subject him to police action and/or being deported from Sabah by the immigration authorities. Regarding the alleged forced registration and the threats of police action and/or deportation for non-registration, the first plaintiff's own evidence is that he was informed of these by the second plaintiff (paragraph 18 of the plaintiffs' joint affidavit). Strictly, in the second plaintiff's affidavit evidence, the second plaintiff did not clearly say who had informed, warned and threatened him to register (see paragraph 28 of the plaintiffs' joint affidavit). But if his version is that "the officials concerned" did so, their true identities are unknown. Moreover, if the "officials" were from the Settlement (or Resettlement) Division of the Chief Minister's Department, Sabah, there is from Michael Chin Chen Phin, director of the Division, the affidavit evidence, which is uncontroverted, that the registration under the exercise is on a voluntary basis and no one is compelled to register against his will. Michael Chin also refuted the allegations that the second plaintiff was forced to register and that there had been threats of forced registration or deportation as alleged. In the light of Michael Chin's evidence and tested against the vague allegation of the "officials" in the second plaintiff's affidavit evidence, I have no reason to disbelieve Michael Chin's evidence as deposed by him. I am not making any specific finding that the second plaintiff had not been forced or threatened. But it appears reasonable to accept, which I do, that any force or threats, even if in fact having been meted out to the second plaintiff, would not have been the act of or authorized by the Resettlement Division through which the first defendant acted, and the fear as contended by the first plaintiff and rested on what he was told by the second plaintiff was, therefore, not founded on any reasonably acceptable firm basis.

If by "the official" the second plaintiff meant those of the second defendant, it appears reasonably obvious that the second defendant being a limited company and merely engaged in assisting the exercise had no power to force and deport anyone.

The evidence of the second plaintiff seriously lacks particularity and is much too vague to support the first plaintiff's fear of deportation as alleged, especially so when one takes into consideration the evidence of Michael Chin. I find the evidence adduced by the plaintiffs too vague to support the allegation of fear or risk of police action and deportation by reason of refusal or failure of the first plaintiff to register under the exercise. Assuming I am wrong on this, consideration must be given that the grant of the interlocutory injunction against the second defendant as prayed would be futile since the first defendant could still go on with the exercise.

Barring the issues of police action and deportation which I find to be rested on meagre and vague evidence, and on the basis that the exercise cannot be halted by this application, there remains the question of damages, if any, for the loss the first plaintiff might suffer if the first plaintiff were to succeed at the trial of the action. It appears hardly any doubt that he would be adequately compensated by an award in the circumstance.

For the first plaintiff, counsel also submitted that if the first plaintiff did not register, he would not get the necessary documents and no employer would employ him. With respect, this submission of employment is unacceptable. No evidence has been adduced to support the contention. Counsel relied on some paragraphs which he quoted in a newspaper cutting (exh. "C" annexed to the plaintiffs' joint affidavit). Apart from its hearsay nature, the paragraphs quoted dwelt on recognition of the uniform identification cards for identification purposes. There was no mention about availability of employment or otherwise. In any event, damages would be an adequate remedy for the first plaintiff in this respect.

As regards the second plaintiff, he had registered under the exercise. In the circumstance, the interlocutory injunction to restrain the second defendant from assisting in the exercise as sought

in the present application would be of no effect on the second plaintiff since he had registered. In other words, by reason of the fact that the second plaintiff has already registered himself under the exercise, the interlocutory relief as sought to halt the second defendant from assisting in the exercise would not save the second plaintiff from registration. He would not be punished or deported by reason of non-registration since he had already registered.

His ground for asking the interlocutory injunction is that he fears that the first defendant may, upon perusing all the information he had provided in the course of the registration, decide to deport him from Sabah (paragraph 30 of the plaintiffs' joint affidavit). Here, again, the interlocutory relief sought would have no assistance to the second plaintiff since he already had given "the information" in the course of his registration.

The plight of the family is, of course, a matter to be taken into consideration. That, however, must be weighed together with all other factors, not the least of which is "the information" which the second plaintiff raised but which, unfortunately, no details or particulars are given, not even the nature thereof.

Furthermore, as stated earlier, the interlocutory relief of restraining the second defendant from "participating ... assisting ... undertaking and carrying out jointly or otherwise with the Settlement Division ..." (using the words of the plaintiffs in the application) in the exercise, even if granted, could not preclude the first defendant from carrying on the exercise.

In all the circumstances including the unsatisfactory quality of the second plaintiff's affidavit evidence as to the source of fear of police action and deportation and the lack of particulars of "the information" on the one hand, and the evidence from the defendants of the voluntary nature of registration under the exercise and the irrelevancy of the injunctive relief sought, namely, to refrain the second defendant from engaging in the exercise, so far as concerning the second plaintiff who had registered on the other, I am of the view that the plaintiffs have failed to show a reasonably real risk of police action and deportation and the relevancy of the interlocutory injunctive relief in relation to his fears of police action and deportation; and in my opinion, damages would be an adequate remedy and the defendants would be in a financial position to pay them.

Balance of convenience

I shall take the matter a step further. Assuming that damages will not be an adequate remedy for the plaintiffs if they succeed at the trial, the next matter to consider is the balance of convenience, or, as per May L.J. in *Cayne* v. *Global Natural Resources plc.*[2], the balance of the risk of doing an injustice.

In this connection, I assume that the unlikelihood would happen, namely, police actions and deportation falling upon the plaintiffs. As against that must be considered the impracticability and ineffectiveness of restraining the second defendant in the manner as sought which I have stated earlier, namely, that the exercise could still be carried on by the first defendant even if the interlocutory relief as sought is granted. I would run the risk of being accused repetitive by stating that so far as concerning the first plaintiff, there is evidence adduced on behalf of the first defendant that registration under the exercise is voluntary. As regards the second plaintiff who had registered, it is unknown what "the information" is that might allegedly lead to his likelihood of being deported. It cannot be due to non-registration since the second plaintiff had registered. In any event, the interlocutory relief of restraining the second defendant from carrying on assisting in the exercise not only will be of no help to the second plaintiff since he had registered, but also will not have the effect of stopping the exercise since the first defendant is free to continue with it.

Another factor of significance to be considered is the objectives of the exercise initiated and carried on by the first defendant as an executive authority. I have earlier on in this judgment enumerated the objectives and I do not propose to repeat them. In my opinion, the first defendant as an executive authority is performing duties beneficial to the public at large. That being so, it is necessary to look at the balance of convenience more widely, and take into account the interests of the public in general to whom the duties are owed and the beneficial objects are directed. Public interest is involved in the exercise. And the public interest is a legitimate and special factor to be considered in assessing where the balance of convenience lies. See *Smith* v. *Inner London Education Authority*[3] applying the principle of "special factors" as pronounced by Lord Diplock in *American Cyanamid* v. *Ethicon Ltd.*[1] at p. 409.

Having heard the arguments of counsel for both sides to the application and having considered all the materials including the affidavit evidence and the materials before me and all the circumstances of the case, I come to the conclusion that the balance of convenience lies in favour of refusing the interlocutory relief as sought. In the exercise of the discretion of the court, I refuse the application. The application is dismissed with costs to the second defendant. In the absence of an agreement between the parties, such costs are to be taxed.

Another matter needs be mentioned. In arriving at the above conclusion, I placed no reliance on the supplementary affidavit evidence of Miss Mary Roberts, counsel for the second defendant, since I tend to agree with the submission of counsel for the plaintiffs that no source or ground of the matters therein deposed has been disclosed.

Order accordingly.

Solicitors: *Nicholas Fung, Tokuzip & Co.; Sugumar & Co.*

LEE BROTHERS CONSTRUCTION CO. v. TEH TENG SENG REALTY SDN. BHD.

[O.C.J. (Peh Swee Chin J.) September 10, 1987]

[Ipoh – Civil Suit Nos. 23-106-87 and 23-107-87]

Civil Procedure – Stay of proceedings pending arbitration – Application for – Principles applicable – Whether application could be heard together with Order 14 application – Merits of application.

Arbitration – Stay of proceedings pending arbitration – Application for – Principles applicable.

In both civil suits, *i.e.* Civil Suit No. 23-106-87 and Civil Suit No. 23-107-87, the plaintiffs were building contractors and the defendant was a housing developer.

In Civil Suit No. 23-107-87, the plaintiffs claim damages for breach of contract while in Civil Suit No. 23-106-87, the plaintiffs claim the balance of the total sum due on three progress-payment certificates issued by the architect in question. Both civil suits arise out of the building contract between the parties.

The defendant filed an application in each suit that all further proceedings be stayed pursuant to section 6 of the Arbitration Act 1952 consequent on the parties herein being parties to an earlier arbitration agreement.

In each of the civil suits, an Order 14 application has been filed.

It was contended that an application for a stay could be heard at the same time with an application for summary judgment under Order 14. It was also contended that with regard to Civil Suit No. 23-107-87, the plaintiffs' claim should not go for arbitration.

Held: (1) in an application for a stay of action on the ground that the matter should be referred to arbitration, not only should there be a valid arbitration agreement, the applicant should also apply for a stay before taking any step in the proceedings after appearance. The applicant must satisfy the court that he was, at the time when proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration. In the face of such an application from a defendant, the plaintiffs will have the onus of showing that the matter ought not to be referred to arbitration and if the plaintiffs fail to discharge that onus, the court will assume there is no sufficient ground for not granting a stay. In exercising its discretion, it is the *prima facie* duty of the court to act upon such an arbitration agreement;

(2) on the facts, the applications for stay on the one hand and applications for summary judgment on the other hand could not and should not be heard together at the same time. The applications for stay should be heard first;

(3) the applications for stay were allowed. No order was made in each of the Order 14 applications.

Cases referred to:

(1) *Drouth* v. *The Ship, "Paul Donmer"* [1934] M.L.J. 72.
(2) *Willesford* v. *Watson* (1873) 8 Ch. App. 473, 480.
(3) *Pitchers Ltd.* v. *Plaza (Queensbury) Ltd.* [1940] 1 All E.R. 151.
(4) *Dawnays Ltd.* v. *F.G. Minter Ltd. & Trollope And Colls Ltd.* [1971] 1 W.L.R. 1205.
(5) *Bandar Raya Developments Bhd.* v. *Woon Hoe Kan & Sons Sdn. Bhd.* [1972] 1 M.L.J. 75.
(6) *Modern Engineering (Bristol) Ltd.* v. *Gilbert Ash (Northern) Ltd.* [1974] A.C. 689.
(7) *Alliance (Malaya) Engineering Co. Sdn. Bhd.* v. *San Development Sdn. Bhd.* [1974] 2 M.L.J. 94.
(8) *Elf Petroleum S.E. Asia Pte. Ltd.* v. *Winelf Petroleum Sdn. Bhd.* [1986] 1 M.L.J. 177.
(9) *Piercy* v. *Young* (1880) 14 Ch. D. 200.

APPLICATION.

Hira Singh for the plaintiff.
S.N. Leow for the defendant.

Cur. Adv. Vult.

Peh Swee Chin J.: In both civil suits, *viz.* Civil Suit No. 23-106-87 and No. 23-107-87 respectively, the plaintiffs are building contractors, and the defendant, a housing developer.